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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

O & S HOLDINGS, LLC, et al.,

Plaintiffs and Appellants,

v.

FIREMAN'S FUND INSURANCE  
COMPANY, et al.,

Defendants and Respondents.

B231912

(Los Angeles County  
Super. Ct. No. BC422173)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Amy D. Hogue, Judge. Affirmed.

Shernoff Bidart Echeverria, Michael J. Bidart, Ricardo Echeverria, and Steven Schuetze; Law Offices of Jacques Soiret and Jacques Soiret for Plaintiffs and Appellants.

Hager Dowling Lim & Slack, John V. Hager, and Michael L. Bean for Defendants and Respondents Fireman's Fund Insurance Company, National Surety Corporation, and The American Insurance Company.

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Appellant O & S Holdings, LLC, along with its related entities and principals, appeals from the trial court's grant of summary judgment in favor of respondents Fireman's Fund Insurance Company, National Surety Corporation, and The American Insurance Company.<sup>1</sup> A real estate development owned by O & S Holdings was insured under policies issued by Fireman's Fund which expressly excluded coverage for property damage arising from construction defects. Following Fireman's Fund's denial of coverage of O & S Holdings' tendered claims, O & S Holdings filed this action for breach of contract and insurer bad faith. The trial court granted summary judgment in favor of Fireman's Fund on the ground that O & S Holdings made admissions of fact in its pleadings that its property damage claims were based on construction defects. On appeal, O & S Holdings challenges the trial court's grant of summary judgment and its denial of a request for a continuance. We conclude that the trial court properly granted summary judgment and denied a continuance because O & S Holdings was bound by material allegations in its complaint, which precluded its claims against Fireman's Fund as a matter of law. We accordingly affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. Tender of Property Damage Claims to Insurers**

O & S Holdings is the owner and developer of the Bridge Street Town Center, a large multi-use real estate development in Huntsville, Alabama. The property includes, among other structures, a hotel, an office tower, and a 10-acre lake. O & S Holdings insured the Bridge Street Town Center through an Owner Controlled Insurance Program (the "OCIP policy") which provided coverage for property damage and loss of use caused by construction defects. O & S Holdings also insured the Bridge Street Town Center

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<sup>1</sup> The principals and related entities of O & S Holdings are Gary Safady, Paul Orfalea, Huntsville Shores, LLC, Huntsville Hotel Partners, LLC, and HSV Lake Properties, LLC. For purposes of this appeal, we shall collectively refer to the appellants as O & S Holdings and to the respondents as Fireman's Fund.

through policies separately issued by Fireman’s Fund (the “Fireman’s Fund policies”). The Fireman’s Fund policies insured against “all risks of direct physical loss or damage,” but expressly excluded coverage for any loss or damage caused by construction defects.<sup>2</sup>

As alleged by O & S Holdings, it “identified multiple construction defect issues” throughout the Bridge Street Town Center beginning in August 2008. Immediately upon discovering these issues, O & S Holdings provided both Fireman’s Fund and the OCIP insurers with written notice of claims for property damage and loss. Neither Fireman’s Fund nor the OCIP insurers agreed, however, to provide coverage for any of the tendered claims. In its denial of coverage letters, Fireman’s Fund explained that it was denying coverage of the claims based, in part, on the policy exclusion for construction defects.

## **II. Civil Actions Against Contractors and Insurers**

In or about May 2009, O & S Holdings filed multiple civil actions in Alabama against its general contractor and subcontractors for the Bridge Street Town Center. In the Alabama lawsuits, O & S Holdings alleged that the property damage at the Bridge Street Town Center was caused by the defective work and use of defective materials by the general contractor and subcontractors. In September 2009, O & S Holdings filed the instant action against both the OCIP insurers and Fireman’s Fund for breach of contract and breach of the implied covenant of good faith and fair dealing. In its operative Third Amended Complaint in this case, O & S Holdings alleged that all of the property damage at the Bridge Street Town Center was covered under the OCIP and Fireman’s Fund policies, and that both the OCIP and Fireman’s Fund insurers unreasonably failed to provide coverage for such claims in accordance with the policy terms.

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<sup>2</sup> Each Fireman’s Fund policy specifically provided as follows: “This Coverage Section does not insure against loss, damage or expense caused by or resulting from . . . [¶] Faulty, inadequate or defective: [¶] 1. Planning, zoning development, surveying, siting; [¶] 2. Design specifications, workmanship, repair, construction, renovation, remodeling, grading compaction; [¶] 3. Materials used in repair, construction, renovation, or remodeling; or [¶] 4. Maintenance; of part or all of any property wherever located.”

As set forth in the Third Amended Complaint, the property damage sustained by O & S Holdings at the Bridge Street Town Center consisted of the following:

Hotel Sheathing. The hotel suffered severe water intrusion from the exterior stucco and windows of the structure. The damage to the exterior sheathing of the hotel was caused by the failure of the general contractor and subcontractors to properly install the exterior stucco, wall framing, and windows.

Hotel Millwork. The millwork in the hotel was delaminated and defective. The damage to the millwork was caused by the improper fabrication of materials and defective installation by the general contractor and subcontractors.

Lake. The lake began to leak water. The damage to the lake was caused by the failure of the general contractor and subcontractors to properly construct the lake.

Officer Tower. The officer tower sustained multiple losses, including water intrusion. The damage to the office tower was caused by poor workmanship and installation of non-compliant materials by the general constructor and subcontractors.

Parking Deck. A section of the steel sub-framing of the east parking deck failed and the parking deck had to be closed for safety reasons. The damage to the parking deck was caused by the defective work of the general contractor and subcontractors.

Other Damage to Hotel. There were several leaks in the roof of the hotel over the spa, workout room, and kitchen, which were caused by the defective work of the subcontractors. The hotel health club suffered damage resulting from a leak. The hotel garage suffered damage resulting from the degradation of the concrete foundation.

### **III. Fireman's Fund's Motion for Summary Adjudication**

In October 2010, Fireman's Fund filed a motion for summary adjudication pursuant to Code of Civil Procedure section 437c, subdivision (f)(1).<sup>3</sup> The motion specifically identified five categories of alleged property damage claims (the "Hotel Water Intrusion Claim," the "Millwork Claim," the "Lake Claim," the "Office Tower

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<sup>3</sup> All further statutory references are to the Code of Civil Procedure.

Claim,” and the “East Parking Deck Claim”), and as to each claim, sought summary adjudication of the following three issues: (1) Fireman’s Fund did not owe any contractual duty to O & S Holdings; (2) Fireman’s Fund did not breach any contractual duty owed to O & S Holdings; and (3) Fireman’s Fund was not liable to O & S Holdings in contract or in tort.<sup>4</sup> In support of its motion, Fireman’s Fund argued that its insurance policies issued to O & S Holdings expressly excluded any coverage for construction defects and that O & S Holdings had alleged in its Third Amended Complaint that each of these five property damage claims arose from construction defects. Fireman’s Fund asserted that, because O & S Holdings was bound by the factual allegations in its pleadings under the doctrine of judicial admissions, the claims failed as a matter of law.

In its opposition to the summary adjudication motion, O & S Holdings requested that the motion be continued or denied without prejudice pursuant to section 437c, subdivision (h) until the Alabama litigation was resolved. In a supporting declaration, counsel for O & S Holdings stated that the same construction defect issues raised in Fireman’s Fund’s motion currently were being litigated in the Alabama lawsuits. Counsel noted that, although it was O & S Holdings’ position in the Alabama litigation that the property damage at the Bridge Street Town Center was caused by construction defects, the contractors and subcontractors involved that litigation had not admitted liability and were vigorously defending against the construction defect claims. Counsel reasoned that it was possible that the Alabama litigation could result in a finding that some or all of the property damage was not the result of construction defects, which O & S Holdings could then rely on to oppose the summary adjudication motion in this case.

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<sup>4</sup> With respect to the “Hotel Water Intrusion Claim,” Fireman’s Fund noted that its summary adjudication motion was limited to O & S Holdings’ alleged claim for damage to the exterior sheathing of the hotel, and did not address any claim for water damage to the interior of the hotel.

On December 20, 2010, the trial court denied the request for a continuance and granted the summary adjudication motion. The court concluded that O & S Holdings was bound by the construction defect allegations in its complaint under the doctrine of judicial admissions. The court further concluded that, even if it could disregard such admissions, O & S Holdings had not filed a separate statement or submitted any evidence to create a triable issue as to whether the Fireman's Fund policies covered property damage caused by construction defects or whether the property damage at the Bridge Street Town Center was caused by anything other than construction defects. With respect to the request for a continuance, the court determined that O & S Holdings had not made the requisite showing that facts essential to oppose the motion might exist, but simply was asking the court to wait to see if O & S Holdings lost its Alabama lawsuits, at which time it might change its theory of the case.

At the conclusion of the hearing, counsel for Fireman's Fund orally represented to the trial court that all claims pending against his clients were "absorbed within [the] broad categories" of property damage claims on which the summary adjudication motion was based. Counsel for O & S Holdings did not object or otherwise respond to this statement. Based on that representation, the trial court granted summary judgment for Fireman's Fund and entered judgment in Fireman's Fund's favor. O & S Holdings filed a timely appeal.<sup>5</sup>

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<sup>5</sup> Contrary to Fireman's Fund's representation at the summary adjudication hearing, its motion did not address all claims alleged against it in the Third Amended Complaint. Specifically, the motion did not seek summary adjudication of O & S Holdings' claims for property damage related to the hotel roof, hotel health club, or hotel garage, nor did it address any claim for water damage to the interior of the hotel as a result of the alleged defects in the exterior sheathing. However, O & S Holdings never objected to Fireman's Fund's representation about the scope of its motion in the trial court, nor does it raise this issue on appeal. Consequently, O & S Holdings has forfeited any argument that the trial court's order should have been limited to a grant of summary adjudication, and not summary judgment. (*Marriage of Falcone* (2008) 164 Cal.App.4th 814, 826 [appellate court ordinarily will not consider procedural defects or erroneous rulings where an objection could have been, but was not raised in trial court]; *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 [absent sufficient showing of justification for

## DISCUSSION

On appeal, O & S Holdings challenges the trial court's order granting summary judgment in favor of Fireman's Fund. Specifically, O & S Holdings asserts the trial court erred in granting summary judgment based solely on the allegations in the pleadings and absent an affirmative showing by Fireman's Fund that the property damage at issue was caused by construction defects. Alternatively, O & S Holdings argues that the trial court abused its discretion in failing to either continue the hearing or deny the motion without prejudice pursuant to section 437c, subdivision (h). We conclude that the trial court did not err in denying a continuance or in granting summary judgment because O & S Holdings was bound by the unequivocal admissions in its complaint in this case, which demonstrated the absence of any triable issue of material fact as to Fireman's Fund.

### I. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action . . . ." (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.)

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failure to raise issue in a timely fashion, appellate court need not consider issue not adequately presented in parties' briefs].)

Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where it is shown that no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).). The decision whether to grant a continuance under section 437c, subdivision (h), is reviewed for an abuse of discretion. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.)

## **II. The trial court properly granted summary judgment.**

O & S Holdings contends that summary judgment was improper in this case because Fireman's Fund failed to meet its burden of proving that construction defects caused the property damage at issue, and instead relied solely on the factual allegations contained in O & S Holdings' complaint. This claim lacks merit, however, based on the long-standing doctrine of judicial admissions.

"The admission of fact in a pleading is a 'judicial admission.'" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 (*Valerio*).) "It is a *waiver of proof* of a fact by conceding its truth," and "is *conclusive* on the pleader." (*Id.* at pp. 1271, 1272.) The pleader "cannot offer contrary evidence *unless permitted to amend*, and a judgment may rest in whole or in part upon the admission without proof of the fact." (*Id.* at p. 1272; see also *Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 613 "[A] judicial admission cannot be rebutted: It estops the maker.") "Thus, the trial court may not ignore a judicial admission in a pleading, but must conclusively deem it true as against the pleader. [Citation.]" (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1155 (*Thurman*).)

In moving for summary judgment or summary adjudication, a defendant "may rely on the allegations contained in the plaintiff's complaint, which constitute judicial



admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues.”” (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324 (*Castillo*); see also *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747 [“In moving for summary judgment, a party may rely on the doctrine of judicial admission by utilizing allegations in the opposing party’s pleadings to eliminate triable issues of material fact.”]; *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co. (St. Paul)* (2003) 111 Cal.App.4th 1234, 1248 [“In summary judgment or summary adjudication proceedings, ‘[a]dmissions of material facts made in an opposing party’s pleadings are binding on that party as “judicial admissions.”””].) “““While inconsistent *theories* of recovery are permitted [citation], a pleader cannot blow hot and cold as to the facts positively stated.”” [Citation.]” (*Castillo, supra*, at p. 1324.)

In its operative complaint in this case, O & S Holdings affirmatively alleged that each of the property damage claims at issue resulted from construction defects. Specifically, O & S Holdings alleged that: (1) the damage to the exterior sheathing of the hotel was “caused by the failure of the general contractor . . . and its subcontractors . . . to properly install the exterior stucco and windows”; (2) the damage to the millwork in the hotel was the “result of improper fabrication of materials and installation by the contractors and subcontractors”; (3) the damage to the lake was “caused by the failure of the general contractor . . . and its subcontractors . . . to properly build and construct the [l]ake”; (4) the damage to the office tower was “due to poor workmanship of window installation and . . . the installation of non-compliant materials by the general constructor and subcontractors”; and (5) the damage to the parking deck was the “result of the defective work of the general contractor . . . and its subcontractors.” Notably, O & S Holdings did not allege that any of the property damage that it sustained at the Bridge Street Town Center could have been caused by anything other than construction defects. Rather, based on the well-pleaded allegations in its complaint, O & S Holdings’ sole theory of the case was that the defective construction and use of defective materials by its contractors gave rise to each of the claims at issue in the summary adjudication motion.

O & S Holdings was therefore bound by these material factual allegations as judicial admissions.<sup>6</sup>

On appeal, O & S Holdings does not dispute that the Fireman's Fund policies expressly excluded coverage for property damage resulting from construction defects. Nor does O & S Holdings deny that its complaint affirmatively alleged that the property damage at issue was caused by construction defects. Rather, O & S Holdings argues that Fireman's Fund improperly relied on the doctrine of judicial estoppel to support its summary adjudication motion. ““Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] . . .” [Citation.] The doctrine applies when: ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ [Citations.]” (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.) O & S Holdings reasons that judicial estoppel does not apply here because there has been no judicial determination in the Alabama litigation that all of the property damage at the Bridge Street Town Center was caused by construction defects, nor any finding that its position in the Alabama litigation was not the result of mistake.

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<sup>6</sup> Additionally, although not addressed by the parties on appeal, the record reflects that O & S Holdings further verified in its written discovery responses that at least some of the property damage at issue was caused by construction defects. Specifically, in its responses to Fireman's Fund's form interrogatories, O & S Holdings repeated many of the factual allegations set forth in its Third Amended Complaint, including that the damage to the exterior sheathing of the hotel was caused by the failure of the general contractor and its subcontractors to properly install the exterior stucco and windows, the damage to the hotel millwork was caused by defective installation and improperly fabricated materials, the damage to the lake was caused by the failure of the contractors to properly construct the lake, and the damage to the office tower was caused, in part, by the installation of non-compliant materials.

However, Fireman's Fund did not base its motion for summary adjudication on the doctrine of judicial estoppel and the trial court did not rely on judicial estoppel in ruling on the motion. Rather, Fireman's Fund's motion was based on the distinct doctrine of judicial admissions under which allegations of material facts made in a party's pleadings are binding on that party as judicial admissions. (*Thurman, supra*, 203 Cal.App.4th at pp. 1155-1156; *Castillo, supra*, 146 Cal.App.4th at p. 1324; *St. Paul, supra*, 111 Cal.App.4th at p. 1248; *Valerio, supra*, 103 Cal.App.4th at pp. 1271-1272.) The trial court likewise granted summary judgment in favor of Fireman's Fund on the ground that O & S Holdings was bound by the factual admissions in its Third Amended Complaint, which precluded its property damage claims against Fireman's Fund as a matter of law.

Furthermore, contrary to O & S Holdings' contention, the trial court did not have discretion to disregard these judicial admissions in ruling on the summary adjudication motion. Rather, the court was required to "conclusively deem [them] true as against" O & S Holdings, which had "the effect of removing the matter from the issues" in dispute. (*Thurman, supra*, 203 Cal.App.4th at p. 1155 [trial court erred in relieving plaintiff from effect of admissions in his complaint where plaintiff failed to take necessary procedural steps to obtain relief from admissions by seeking leave to amend]; see also *Valerio, supra*, 103 Cal.App.4th at pp. 1271-1272 [trial court did not retain inherent or equitable power to disregard admissions in a party's pleadings].) The trial court properly applied the doctrine of judicial admissions in this case.<sup>7</sup>

In sum, because Fireman's Fund presented undisputed evidence that its policies to O & S Holdings expressly excluded coverage for construction defects, and because

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<sup>7</sup> O & S Holdings' reliance on *Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853 (*Kurini*) to support its argument is misplaced. In *Kurini*, the Court of Appeal noted that, although the trial court had discretion to disregard admissions made in a motion for attorney's fees regarding the reasonableness of the fees requested, the court did not abuse its discretion in deciding to credit those admissions. (*Id.* at p. 871.) The *Kurini* court did not, however, address whether there is judicial discretion to ignore an admission that is contained in a party's own pleadings. The applicable case law confirms that there is no such discretion.

O & S Holdings admitted in its complaint that the property damage claims at issue were based on construction defects, the trial court did not err in granting summary judgment in favor of Fireman's Fund.

### **III. The trial court properly denied the request for a continuance.**

Alternatively, O & S Holdings asserts that the trial court abused its discretion in failing to continue or deny the summary adjudication motion pursuant to section 437c, subdivision (h) because O & S Holdings made a good faith showing that facts essential to opposing the motion might exist, but could not be presented until the Alabama litigation had been resolved. This claim also fails, however, based on the binding effect of O & S Holdings' judicial admissions.

Section 437c of the Code of Civil Procedure directs a trial court to deny a summary judgment motion or to continue the hearing upon a good faith showing that an extension of time is needed to obtain facts essential to justify opposition to the motion. (§ 437c, subd. (h) ["If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had . . ."].) To demonstrate good faith, the party seeking a continuance must submit an affidavit or declaration showing that "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) "The purpose of the affidavit required by . . . section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]' [Citation.]" (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397.) "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.)

In a declaration supporting the request for a continuance, counsel for O & S Holdings explained that if the Alabama litigation resulted in a finding that some or all of the property damage at the Bridge Street Town Center was not the result of construction defects, then O & S Holdings could rely on that finding to oppose Fireman's Fund's contention that each damage claim at issue in its summary adjudication motion fell within the policy exclusions for construction defects. However, even assuming that there is such an adverse finding to O & S Holdings in the Alabama litigation, O & S Holdings could not present evidence of that finding to contradict its judicial admissions in this case. As discussed, facts established by the pleadings as judicial admissions “are *conclusive* concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her.” (*St. Paul, supra*, 111 Cal.App.4th at p. 1248.) Indeed, “[b]ecause an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. [Citation.]” (*Valerio, supra*, 103 Cal.App.4th at p. 1271.)

Given that O & S Holdings is bound by the construction defect allegations in its complaint against Fireman's Fund as judicial admissions, it would not be allowed to rely on any contrary finding in the Alabama litigation to create a triable issue of fact in this case. Accordingly, any finding by an Alabama court that the property damage at the Bridge Street Town Center was not caused by construction defects would be irrelevant and immaterial to the issues raised in Fireman's Fund's summary adjudication motion. Under these circumstances, O & S Holdings was not entitled to a continuance under section 437c, subdivision (h) because it failed to show that facts essential to opposing Fireman's Fund's motion for summary adjudication might exist. The trial court did not abuse its discretion in denying the request for a continuance.

## **DISPOSITION**

The judgment is affirmed. Fireman's Fund shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.